No. 19.
Sup. Ct. of Maury for P. E.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

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A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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In the celebrated case of Hunter *vs.* Martin, devisees of Fairfax (4 Munf., 1), the Supreme Court of Appeals of Virginia declined to yield to the judgment of this Court reversing the judgment of that Court in the said case, and took the alarming position that the power of revision of the judgments and decrees of the State Courts which had been asserted from the foundation of the Government by this Court and also by Congress in section 25 of the Judiciary act of 1879 (1 Stat., c. 20, p. 85) was without support in the

Constitution, and that all proceedings of this Court, under the power so claimed, were *coram non judice*, and, of course, open to collateral attack everywhere as nullities.

While that learned State Court, yielding to the force of reason and the great preponderance of opinion of the bench and bar of the several States, no longer offers open resistance to the constitutional authority of this Court to review its judgments and decrees in certain cases, it has, nevertheless, attempted, in the present case, to set that authority at naught by employing a process of evasion which, if successful, must, it is manifest, open the door to mischievous consequences of a far-reaching character.

This Court, following the decisions of the Supreme Court of Appeals of Virginia in Antoni *vs.* Wright (22 Gratt., 833); Wise *vs.* Rogers (24 Gratt., 169), and Clarke *vs.* Tyler (30 Gratt., 134) has repeatedly held, after full and able discussions at the bar, that the provisions of the acts of the legislature of Virginia of March 30, 1871, and March 28, 1879, that the coupons attached to the bonds authorized by the respective acts should be "*receivable, at and after maturity, for all taxes, debts, dues and demands due the State, which shall be so expressed on their face*," is a valid contract with the holders of such coupons, which is made inviolable by Article 1, sec. 10 of the Constitution of the United States. (Greenhow *vs.* Hartman, 102 U. S., 672; Antoni *vs.* Wright, 107 U. S., 770; Poindexter *vs.* Greenhow, 114 U. S., 270; McGahey *vs.* Virginia, 135 U. S., 662.)

As the natural result of the repeated decisions of this Court upon the meaning and effect of the coupon clause of the respective acts of 1871 and 1879, *which it was the peculiar province of this Court to determine, under the Constitution*, tax-

payers of Virginia have, for years, been purchasing and tendering coupons, issued under both acts, in payment of taxes, and to this day these tax-payers stand upon and keep good said tenders as their sole protection from the pains and penalties to which the delinquent tax-payer is liable, and this in the faith that the right to tender them in payment of "taxes, debts, dues and demands due the State" had been absolutely established by this Court, and could not be again shaken or drawn in question by any court or other authority of the State of Virginia.

The plaintiff in error, A. A. McCullough, having tendered in payment of a tax of $498, assessed against him on real estate, certain coupons clipped from bonds issued under the said acts of March 30, 1871, and March 28, 1879, filed his petition in the Circuit Court of Norfolk City against the Commonwealth of Virginia, for the purpose of having the coupons so tendered verified, as required by sections 406, 407 and 408 of the Code of Virginia.

The Commonwealth demurred to the petition and moved to dismiss it on several grounds and especially on the ground that the acts of March 30, 1871, and March 28, 1879, were unconstitutional, being, as contended, in conflict with sections 7 and 8 of Article VIII of the State Constitution.

But the Court overruled the demurrer and other defenses set up, and the jury having found that the coupons tendered were genuine and legally receivable for the tax for which they were tendered, the Court thereupon adjudged "that the said coupons are fully proved as genuine, legal coupons, past due, and receivable for the taxes, debts, and demands due the Commonwealth of Virginia, for which they were ten-

dered, which is ordered to be certified to the treasurer as required by law." (Rec., p. 11.)

Thereupon the case was removed by the Commonwealth to the Supreme Court of Appeals on a writ of error, and that Court reversed the judgment and dismissed the petition, on the ground that the coupon clause of the acts of March 30, 1871, and March 28, 1879, are null and void, by reason of repugnance to the State Constitution. (Rec., pp. 16–30.)

McCullough, then, to vindicate his violated federal right, applied to the Chief Justice for a writ of error from this Court to the Supreme Court of Appeals (Rec., pp. 1–3), which was allowed (*ib.*, p. 31), and the case is now here.

Argument.

In determining that the coupons issued under the acts of March 30, 1871, and March 28, 1879, were a legal tender for the payment of taxes, this Court expressly held that the coupon contract resulting from the creditors' compliance with the terms of the said acts, respectively, was a valid contract. Before this Court could have decided that certain legislation of the State of Virginia, subsequent to the acts of 1871 and 1879, was invalid, under article 1, section 10, of the Constitution of the United States, because it impaired the obligation of the said coupon contract, it became necessary for this Court to investigate and decide the question *whether there was before it a valid contract under the law of Virginia.*

It follows, therefore, that the question of the validity of the coupon contract under the law of Virginia was an indispensable element of the federal question thus passed

upon by this Court, or, to borrow the language of the Court in Bridge Proprietors *vs.* Hoboken Co. (1 Wall., 116), "The existence of the contract or of the right *is part of the Federal question itself.*"

In spite, however, of the repeated decisions of this Court that the coupon contract was valid, and of its emphatic declaration, in McGahey *vs.* Virginia, (135 U. S., 662, 668), that the question is "*foreclosed*, and no longer open for consideration," the Supreme Court of Appeals of Virginia, disregarding its own previous decisions, held, in this case, that the coupon contract was void, and so reversed the judgment rendered against the Commonwealth by the Circuit Court of Norfolk City.

The ground on which this decision proceeds is that the tax-receivable quality of the coupons in question extends to "*all taxes*" &c., due the State, and, therefore, makes coupons a legal tender for certain taxes which, by the State Constitution, are payable in money, and from this is deduced the conclusion that the whole coupon contract was, upon a principle of the law of contracts, rendered null and void by this alleged taint of illegality, a view of the subject which this Court has considered and deliberately rejected. (Vashon *vs.* Greenhow, 135 U. S., 113.)

This decision was evidently intended by its authors to be the Palladium of Repudiation, for its clear purpose was to accomplish the destruction of the coupon contract in such a way as to elude and defeat the appellate jurisdiction of this Court, and make the Constitution a dead letter so far as the contract rights of the promoters of this coupon litigation are concerned.

If this judicial subterfuge is to stand unrebuked and un-

corrected by this Court, it is manifest that the provision in the Constitution for maintaining federal authority by means of the Courts is inadequate, and that, after all, we have not entirely avoided the infirmity of the old confederation which Hamilton denominated "a hydra in government, from which nothing but contradiction and confusion can proceed" (Federalist, No. 80).

The only point that is really open on this writ of error and that requires consideration, is whether this Court can, under the limitations and restrictions of section 709, Revised Statutes, apply the needed corrective to the judgment below.

Assuming, for the sake of argument merely, that jurisdiction of this writ of error does not attach by reason of any State Statute whose validity is impeached by the Plaintiff in Error on the ground that it impairs the coupon contract, a branch of the case which has been most ably and thoroughly discussed by my colleague, we proceed to look elsewhere for a source of jurisdiction.

When this Court decided that the provisions of the acts of 1871 and 1879, "that the coupons shall be payable semi-annually and be receivable at and after maturity, for all taxes, debts, dues and demands due the State, which shall be expressed on their face," constituted a binding contract between the State and the holders of such coupons which was protected by the Constitution of the United States against impairment by the State, the decision so made became as much a part of the State Statute as if written therein, and, consequently, became a rule of property on the faith of which the communities of the several States were entitled to traffic,

and have continually trafficked, in these coupons as lawful subjects of commerce.

This decision of this Court is a unit, and every element of it is protected and supported by the Constitution of the United States, and so is a part of the supreme law of the land. But it may be asked, whether that supremacy is more than *nominal*, if the Supreme Court of Appeals of Virginia or the highest court of any other State, disregarding its sworn duty under the Constitution of the United States, can, *on any ground or pretext whatever*, now declare this coupon contract invalid.

The plaintiff in error and all other holders of coupons issued under the acts of March 30, 1871, and March 28, 1879, *have a vested right* in the decision of this Court that such coupons are a legal tender, on and after maturity for the payment of taxes due the State, and that this immunity "*is securely shielded by the Constitution*" (Poindexter *vs.* Greenhow, 114 U. S., 276,). It is believed that the position thus taken is supported by the decisions of this Court.

For example, in Douglass *vs.* County of Pike (101 U. S., 677, 687), the Court say:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

In Rowan *vs.* Runnells (5 How., 134) this Court refused to follow the decisions of the highest tribunals of Mississippi holding certain contracts void by the law of that State, but

adhered to its decision in Groves *vs.* Slaughter (15 Pet., 449), upholding such contracts.

The Court say:

"Acting under the opinion thus deliberately given by this Court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly, this Court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

"But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this Court were lawfully made. For, if such a rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory" (p. 139).

In Havemeyer *vs.* Iowa County (3 Wall., 294) this Court, in affirming and enforcing Gelpcke *vs.* The City of Dubuque (1 Wall., 175), say:

"In that case it was held that, if the contract, when made, was valid by the Constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it" (p. 303).

It was nothing less than judicial usurpation for the Supreme Court of Appeals of Virginia to hold a statutory contract void which this Court, *in the performance of a constitutional duty*, had, upon great consideration, pronounced valid and binding. When this Court so decided, it was as much the duty of the Supreme Court of Appeals to follow the decision, as it is ordinarily, the duty of this Court to adopt the interpretation put on State statutes by the highest State Courts.

It is impossible that one and the same contract should be valid under the Federal Constitution and void under the Constitution of Virginia. The Constitution of the United States has protected itself against the danger of such discordancy by providing for its own supremacy and the supremacy of every authority to be exercised under it. When, therefore, this Court declared the coupon contract binding, it was the supreme voice of the Constitution to which the Court of Appeals and every other court in the land was bound to submit.

Does it not follow, then, from the aforegoing, that the vested interest which every coupon holder and coupon tenderer has in the decisions of this Court upholding the coupon contract is such a "title right, privilege or immunity" under an authority exercised under the United States as, when denied by the highest court of a State, will support the jurisdiction of this Court under section 709, Revised Statutes? Indeed, this Court has already decided that the right of a party to a judgment rendered by a court of the United States to have due effect given to such judgment as an instrument of evidence in a proceeding in a State tribunal was a right claimed by him under an authority exercised

under the United States the denial of which by the highest court of a State was sufficient to attract the appellate jurisdiction of this Court (Crescent City, &c., Co. *vs.* Butchers' Union, &c., Co., 120 U. S., 141).

If now the holder of a county or municipal bond or coupon has a vested right, as this Court says he has, in an authoritative decision of a State Court upholding the law under which such bond or coupon was issued, because such decision "*becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself,*" and can no more be changed to the prejudice of such contract rights by a subsequent decision than by a subsequent statute, does it not follow that the decision of this Court holding the coupon clause of the acts of March 30, 1871, and March 28, 1879, to be a binding contract *has become as much a part of the clause as the text itself*, and that the holders of the bonds and coupons issued under the said acts have a vested right in the decision as part and parcel of the statutory contract which makes the coupons tax-receivable?

What this Court say, in Fairfield *vs.* County of Gallatin (100 U. S., 47, 51), may be said with truth here:

"There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country."

But for the several decisions of the Court of Appeals upholding the coupon contract of the act of 1871, and the general acquiescence in the same, it would have been impossible for the State to make the new adjustment of her debt by the act of 1879, with its repetition of the coupon clause of the act of 1871.

Indeed, so much has occurred on the faith of judicial assurance, State and Federal, that the coupon clause of these acts was inviolable, that it would be a great reproach to the administration of justice if the judgment below could not be annulled.

Such being the case, this Court, it is presumed, will neither change an opinion construing a statute so as to cut down rights that have previously vested under it, nor follow a change of opinion in a State Court where to do so would be to declare statutory contracts void which had been previously adjudged valid.

Where the stability of property rights has required it, this Court has inflexibly adhered to the doctrine of *stare decisis*, as expounded by Chief Justice Taney in the celebrated case of the Genesee Chief (12 How., 458, 459), where he says, in vindication of the action of the Court in abandoning the old rule confining the jurisdiction of the Admiralty to tidal waters:

"The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights, thus acquired, would not be disturbed. In such a case *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no

rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it" (pp. 458, 459).

While, therefore, this Court will not so misuse judicial discretion as to recede from its construction of the coupon clause to the detriment of vested rights, and while the legislature of Virginia is disabled by the Constitution from impairing the effect of that clause, in any way, by legislation, the Supreme Court of Appeals of Virginia, nevertheless, arrogates to itself the right to declare void what this Court, *in the performance of an undeniable constitutional duty, has declared valid and binding.*

This Court having determined for itself the validity of the coupon contract, will not be disposed, we apprehend, to investigate the reasons upon which the Supreme Court of Appeals have reached an opposite conclusion, it being sufficient to support the jurisdiction of this Court that the judgment or decree of the State Court has resulted in the denial of some right under the Constitution that was properly before it. (Mobile & Ohio Railroad *vs.* Tennessee, 153 U. S., 486, 492, 493 and cases cited.) At the same time, however, it may not be improper to point out briefly the fallacies on which that conclusion rests.

In the first place, the Court below has committed the palpable mistake of holding that the coupon contract could be stricken down without also destroying the entire scheme of settlement of which it forms a part.

Without the coupon clause, the proposal to the creditors, contained in the act of March 30, 1871, to surrender the certificates of indebtedness held by them and receive in return bonds of the State for *two-thirds only* of the face value of the surrendered certificates with accrued interest thereon, or the subsequent proposal of the act of March 28, 1879, that the existing creditors of the State should agree to accept new obligations bearing a lower rate of interest, would have been too absurd to be seriously considered. Manifestly, the creditors who accepted these proposals were induced to do so by the provision in each of them that the coupons attached to the proffered bonds should be a legal tender for the payment of "all taxes, debts, dues and demands due the State," for from the acceptance of this provision would result an irrepealable statutory contract which would place the consenting creditors on a secure footing with regard to the payment of the interest on their bonds that would accrue from time to time, through a long course of years.

In the second place, the Supreme Court of Appeals of Virginia has committed the palpable mistake of overlooking the fact that the plan of settlement between the State and her creditors is *a law as well as a contract*, and cannot be defeated by the application of common-law principles to which ordinary agreements are subject.

Such is the view which this Court has always taken of Congressional land grants. In the case of Missouri, Kansas and Texas Railway Company *vs.* Kansas Pacific Railway Company (97 U. S., 491,) the Court enunciated the doctrine, as follows:

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as

well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will" (p. 497).

In the third place, the Supreme Court of Appeals has committed the palpable mistake of assuming that the State of Virginia intended to make a contract to operate beyond the limitations of the State Constitution. If the State could not stipulate, under her Constitution, that coupons should be a legal tender for certain taxes, it seems clear that the language of the two acts making the coupons receivable for "all taxes, &c.," must be taken subject to all restrictions of the State Constitution, and such will be conclusively presumed to have been the intention of the contracting parties, for, as this Court held in Granada County Supervisors *vs.* Brogden, 112 U. S., 261, 269, the general language of a statute must, if possible, receive such a construction as will render it free from constitutional objection; in other words, it will not be assumed "that the law-making department of the government intended to usurp or assume power prohibited to it."

We submit, therefore, that it is incorrect to say that the coupon contract extends to any tax which, under the State Constitution, could not be paid in coupons.

Now it is to be observed, with reference to the theory of

illegality advanced by the State Court, that this Court has adjudged directly the opposite of that theory, in holding that the clause making coupons receivable for taxes *did not apply to certain descriptions of taxes which the State Constitution requires to be paid in money.* (Vashon *vs.* Greenhow, 135 U. S., 713.)

It is also to be observed that the decision of the State Court leaves the creditors of the State in an intolerable predicament, for the decision virtually declares that the State has the right to repudiate the coupon contracts resulting from the acts of 1871 and 1879, and, at the same time, retain all the benefits of those contracts, including the surrender by the creditors of one-third of her original indebtedness. Shocking as such a result must be to the rudest sense of justice, the Court below does not even intimate that, under its decision, the State is in duty bound to restore the *status quo* of the creditors. It is fortunate for the holders of the bonds and coupons of Virginia that the validity of this decision can be tested in a Court which is beyond the influence of the adverse public sentiment in the midst of which the decision was made.

We submit that a Federal question was "*unmistakably*," if not "*specially*," set up by the plaintiff in error in the court below, and that it is fairly here for review.

When McCullough followed up his tender of the coupons in question by instituting the proceeding below, it is apparent, *as this Court knows judicially*, that he relied necessarily on the decisions of this Court upholding the coupon contract as his sole refuge and protection from the hostile and obstructive laws of Virginia, aptly termed "*coupon killers.*"

Those decisions entered into and formed part of the coupon contract, and of themselves constitute a title, right, privilege, or immunity which McCullough enjoys under the United States.

As this Court derives its appellate jurisdiction directly from the Constitution and not from section 709, Revised Statutes, this Court has an indefeasible power under the Constitution to protect that jurisdiction from the attempt of the State court in this case to evade or defeat it, whether section 709 contemplates the exercise of such power or not. If such power inheres in the constitutional grant of appellate jurisdiction, it would seem that Congress could not dwarf or control it by section 709 without interfering with the coördination and independence of the judicial department of the federal government.

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ADDITIONAL ARGUMENTS IN SUPPORT OF THE WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA IN THE CASE OF A. A. McCULLOUGH vs. THE COMMONWEALTH OF VIRGINIA.

The attention of the Court is respectfully invited to some additional arguments to those contained in the aforegoing brief.

When the jurisdiction of this Court was attracted by the federal question involved in the coupon provision, the interpretation of that provision became the exclusive province of this Court, for the obvious reason, that a coördination of federal and State authority to interpret and apply one and the same provision of a statute is repugnant to the federal supremacy ordained by the Constitution. Indeed, this Court and the court of appeals of Virginia derive their authority to exercise jurisdiction within that State *from the State herself*. By the same authority the former is given supremacy over the latter. This *supremacy* is to insure harmony. Destroy it, discord and confusion must result, as this case shows.

When, therefore, this Court held the coupon provision to be a binding contract between the State of Virginia and the holders of her bonds and coupons, the decision became a part of the provision itself. But can it be that a similar result followed the subsequent decision of the State Court of Appeals holding the same provision *void!*

The coupon provision must either be valid or invalid. It cannot be both. Therefore, after this Court held it to be valid, it seems impossible that the State Court could have authority to pronounce it invalid.

Whether a contract is within the protection of the Constitution, is a question that must be judicially determined whenever it arises. Every such determination involves two considerations; is there a contract, and, if so, is it protected by the Constitution? When these questions are resolved by this Court in favor of the contract, *there is nothing left open in either of them.*

The mere statement of the case at bar is a convincing argument to show that when this Court, in applying the Constitution, has occasion to interpret a provision of a State statute, for any purpose, its interpretation becomes, necessarily, *final* for all purposes, State as well as Federal.

Upon the opposite view, taken below, this Court's interpretation of a State statute must often prove a *snare*, and will, unquestionably, prove such here, should jurisdiction of this writ of error be declined, for numbers of persons, both at home and abroad, have, for a course of years, been seriously changing their positions on the faith of this Court's repeated declarations that the coupon provision is an inviolable contract. It may be confidently stated that an argument leading to such a result cannot be sound.

As contracts for which the protection of the Constitution may be invoked are founded on the law of some State or foreign country, a decision of this Court, which was intended to establish the validity and inviolability of a contract under the Constitution, is practically worthless as a rule of action for the citizen if a State Court can subvert it with impunity,

by holding the contract void, on some principle of general law. But we may be sure that this Court would never have placed itself in any such predicament, for it has uniformly declined the exercise of a clear jurisdiction under circumstances where some other authority, State or Federal, might render such exercise of jurisdiction fruitless.

If this be the law, it is difficult to understand why this Court is tenacious of the *barren right* of determining for itself, irrespective of State decisions, the existence and effect of every alleged contract which it is asked to declare to be under the protection of the Constitution, or why its abdication of that right "would be to surrender one of the most important provisions in the Federal Constitution," as this Court has said it would be, in the language quoted. (State Bank of Ohio *vs.* Knoop, 16 How., 369, 392).

It is evident that this Court did not foresee the possibility of its interpretation of the coupon provision being overturned by some subsequent State decision, when it declared in Poindexter *vs.* Greenhow (114 U. S., 270, 301) that the taxpayer, after duly tendering coupons in satisfaction of his taxes, "*is free from all further disturbance and is securely shielded by the Constitution in his immunity.*"

The effect of the decision of this Court, that the coupon provision is under the protection of the Constitution, was to place every ingredient of the provision beyond State control and transform it into federal law; in other words, the provision became, by means of that decision, as completely interwoven with the Constitution as though the prohibition of that instrument against the legislative impairment of contracts had been specially directed to the contract now in question.

It follows, therefore, that the decision of the Court of Appeals that the coupon provision is a nullity, is a denial to the plaintiff in error of a right secured to him by the Constitution, and so raises a question within one of the limitations put upon the appellate jurisdiction of this Court by section 709, Revised Statutes.

This writ of error may be supported on the further ground, also included in that section, that an authority exercised under a State is drawn in question, as being repugnant to the Constitution of the United States.

It matters not that these federal questions were not expressly raised in the Court of first instance and in the Court of Appeals, if they were "in effect" or "unmistakably" raised in both courts. That they were "in effect" or "unmistakably" so raised must have been the case if the argument is sound that the decisions of this Court had transferred the coupon provision from the domain of State law to that of federal law, thus making the proceeding instituted by the plaintiff in error in the Circuit Court of the City of Norfolk one for the enforcement of a federal right.

It would seem impossible to doubt that the plaintiff in error, in instituting this proceeding under the act of January 14, 1882, for the verification of the coupons he had tendered in payment of his taxes, relied on the decisions of this Court holding void subsequent enactments which, as Mr. Justice Bradley remarks in McGahey *vs.* Virginia, (135 U. S., 662, 673), were resorted to for the "evident purpose" of suppressing the use of coupons altogether, and which, but for those decisions, would have rendered nugatory all proceedings under the verification law. In the nature of things, therefore, the plaintiff in error relied on the author-

ity exercised by this Court under the Constitution in the decisions mentioned as the basis of his suit to establish the genuineness of his coupons. In the nature of things his case was pervaded by federal authority from its origin to its close.

But this writ of error may be sustained, it would seem, on the broader and higher ground, suggested, but not amplified, in the closing paragraph of the aforegoing brief, that there inheres in the grant of appellate jurisdiction to this Court full authority to enforce and protect that jurisdiction, unfettered by section 709, Revised Statutes.

"The appellate powers of this Court are not given by the Judicial Act. They are given by the Constitution" (per Marshall, C. J., Durousseau *vs.* U. S., 6 Cr., 314; The Francis Wright, 105 U. S., 381, 385; United States *vs.* Amer. Bell Telephone Co., 159 U. S., 548, 549). Being so given, they, as other powers from the same source, carry with them all those incidental powers which are necessary to their complete and effectual execution, or, as Mr. Madison puts it in the *Federalist*, (No. 44):

> "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

This Court has, accordingly, held, that, in certain cases, the Executive may act, even to extremity, by virtue of its inherent powers (*In re* Neagle, 135 U. S., 1, and cases there referred to).

From the beginning of the Government down, this Court has exercised original jurisdiction directly under the grant

of the Constitution, and has relied on powers that inhere in the grant both for procedure and for rules of decision, looking to the Congress for nothing. In the case of Tampa Suburban Railroad Company, (168 U. S., —), the Chief Justice refers to this Court's "*inherent powers under the Constitution.*"

Why then should not this Court act directly under the grant of appellate jurisdiction, in any case where the protection and enforcement of its authority as an appellate court requires such action, without looking to section 709, Revised Statutes, *which is in derogation of its appellate power?* Indeed, so far is this section from being a source of jurisdiction, *there is not a head of jurisdiction mentioned in it which this Court does not exercise directly under the Constitution.*

In a word, Congress cannot add one jot or one tittle to the jurisdiction of this Court, original or appellate, nor can it take away or hamper this Court's power to defeat any effort to frustrate jurisdiction once validly exercised by it. The attempt by Congress to exercise any such authority would be a clear invasion of the judicial power of the Constitution.

It resembles "treason to the Constitution," to say that the Court of Appeals of Virginia could declare void the coupon provision, after this Court had, in the performance of a constitutional duty, adjudged it to be a valid, binding contract, and that that court could, at the same time, place such declaration beyond the reach of the appellate power of this Court. To borrow the language of this Court in Neagle's case: "*We do not believe that the government of the United States is thus inefficient.*"

It was intended by the statesmen who framed and the people who adopted the Constitution "that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, *without interruption from a state or from state authorities*" (per Taney, C. J., in Ableman *vs.* Booth, 21 How., 506, 517). In McCulloch *vs.* Maryland, (4 Wh., 316, 427), the Chief Justice, speaking for the Court, says:

"It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution."

The decisions of this Court removing the coupon provision from State control and making it a part of the supreme law of the Union were rendered in the exercise of an undoubted jurisdiction, and it is immaterial to the point now under discussion that the judgment of the Court of Appeals in this case turned on a principle of State law, inasmuch as this writ of error is for the purpose of enforcing the *absolute supremacy* of the decisions referred to, and rests upon the jurisdiction which supports those decisions.

It is familiar law in this Court, that whenever a federal court has rendered a judgment or decree, in a case within the judicial power, it has, by implication, jurisdiction as to everything necessary to make such judgment or decree effective, irrespective of the limitations of the Constitution on that power. Consequently, suits in equity and other proceedings for such ancillary purposes may be maintained in

the Courts of the United States, which, if they stood on an independent footing, would not be cognizable in those Courts.

Upon the same principle, it may be said to inhere in the appellate jurisdiction of this Court to make an auxiliary use of the writ of error, in cases like this, to compel the obedience of the State tribunals to its Constitutional decisions, and prevent a failure of the particular justice which it was the purpose of the Constitution to establish.

It was upon this principle that this Court proceeded in the case of Magwire *vs.* Tyler (17 Wall., 224).

This Court having previously decided the federal question in the case in favor of the original plaintiff (8 Wall., 672), thereby reversing the decree of the State Court, the latter Court, on receipt of the mandate from this Court, reversed its judgment, as therein directed, and then proceeded to hear the cause *de novo*, and, having reached the conclusion that the suit was improperly brought in equity under the State law, dismissed it, thus completely defeating the decree which the mandate of this Court had directed to be executed. As a consequence, the aggrieved party sued out a writ of error from this Court in order to correct the action of the State Court.

A strong effort was made by Mr. B. R. Curtis and Mr. P. Phillips to dismiss this second writ of error, on the ground that the action of the State Court in dismissing the suit for want of jurisdiction as a court of equity did not involve a federal question. In his work on practice (5th ed., pp. 373, 374) Mr. Phillips thus notices the effort and its result:

It was strenuously argued for defendant in error that the court had no jurisdiction of this new writ, either under the

act of 1789 or the act of 1867, as no federal question was raised by the record accompanying it; that the decision countervailed in no particular anything decided by this court; that whether the remedy on the title was, in law or equity, and when and how this question of jurisdiction should be raised, were purely matters of local jurisdiction, and this court could not pass upon them without violating the rights of the State court, which on these subjects was supreme and independent.

A majority of the court, however, held that this second judgment of the State court, "in effect, evaded the directions given to it;" that "State courts have no power to deny the jurisdiction of this court in a case brought here for decision, and sent back with the mandate of this court, which is its judgment. Such a question, that is, the question whether the legal title was in the plaintiff, and whether or not he had an adequate remedy at law, might have been raised in the court of original jurisdiction, and perhaps it might have been raised here when the case was before the court upon the first writ of error; but it is clear that it was too late to raise any such question after the whole case had been decided, and the cause remanded for final judgment."

Swayne, Strong, and Bradley, justices, dissented, and Hunt, justice, took no part in the judgment.

In meeting and frustrating the attempt of the State Court to evade its mandate, this Court deemed it immaterial to consider the point so vigorously pressed by Mr. Curtis and Mr. Phillips, that the action of the State court had no federal complexion; thus plainly refusing to be hampered by the restrictions of section 709, Revised Statutes, in a matter involving the protection and enforcement of its decree.

So in the important case of Davis *vs.* Packard (8 Pet., 321), when here on a second writ of error brought to correct an alleged refusal of the State court to obey the mandate of this Court on the first writ of error, there is no reason to doubt that, if such refusal had, in fact, appeared, this Court would have applied the corrective, without looking into sec-

tion 25 of the Judiciary Act for a federal reason to support its action.

The argument, in favor of the auxiliary use of the writ of error, may be further enforced, by a hypothetical case, which might have occurred under Section 2 of the Act of 1867, had the minority opinion, in Murdock *vs.* Memphis, prevailed.

The judicial power extends to "*all cases*," and not *questions*, arising under the Constitution, laws, and treaties of the United States. Supposing now that Congress should remove the restrictions of Section 709, so that the judgments and decrees of State Courts might be reviewed as to *all questions* involved therein, whether of Federal law or of State law, and that this Court should reverse, *in toto*, the judgment of a State Court, in a case compounded of questions of Federal and of State law, and that the State Court should refuse obedience to such judgment of reversal, in so far as the questions of State law were concerned, may it not be assumed as clear, that this Court would enforce entire obedience to such judgment, by a new writ of error?

It is true that the action of the State Court complained of here is not, as in Magwire *vs.* Tyler (*supra*), a refusal to submit to a former judgment of this Court in the same case, but is a refusal to submit to the previous decisions of this Court, in other cases and between other parties, upon a constitutional question affecting citizens of the several States and of other countries. In principle, however, the two cases are the same, for if the decisions of this Court on questions arising under the Constitution and laws of the United States are precedents for the guidance of the great community of the Union, of what value are they as such unless this Court

has authority to correct any refusal of the State courts to follow them? In other words, what becomes of the supremacy and uniform operation of the Constitution and laws of the Union if such authority does not necessarily inhere in the constitutional supremacy of this Court? As Mr. Webster put it in his speech in defense of the Constitution:

"Can any man give a sensible reason for having a judicial power in this government, unless it be for the sake of maintaining a uniformity of decision on questions arising under the Constitution and laws of Congress, and INSURING ITS EXECUTION? And does not this very idea of uniformity necessarily imply that the construction given by the national courts is to be the prevailing construction? How else, sir, is it possible that uniformity can be preserved?" (Works, vol. 3, p. 484.)

If the Supreme Court of New Hampshire should, in a proper case, hold, on some supposed principle of the common law, that the royal patent, from which Dartmouth College derives its franchises and powers, is not a contract, will any man deny that it would be monstrous to maintain that the absence of a federal question in such judgment would prevent this Court from taking jurisdiction, by writ of error, and compelling obedience to the precedent established by this Court in the case of The Trustees of Dartmouth College *vs.* Woodward (4 Wh., 518)? But wherein does the supposed case differ from the case at bar?

Without intending disrespect, we crave leave to say, that, if the position taken by Virginia, through her judicial department, in the judgment under review is sustainable, it would seem to follow that *nullification* is, after all, not an exploded heresy, but a constitutional remedy in

the hands of any State that may choose to set up its opinion against that of the constituted authority of all the States.

It is fortunate, that the questions in this record, so deeply affecting this Court, have come up, for discussion and decision, at a time more favorable to the development of the meaning of the Constitution than any since its adoption.

State sensitiveness to the exercise of Federal authority, which, formerly, had some prevalence, and to which marked deference is paid in section 25 of the Judiciary act of 1789, has, to a considerable extent, disappeared, and men have come to regard the Federal Government as the *complement*, and not the *enemy*, of the State governments.

This reaction in public sentiment prompted, no doubt, the act of February 5, 1867, c. 28, (14 Stat., 386,) which repealed section 25 of the act of 1789, and re-enacted it, without the provision confining this Court to the federal question, in reviewing the judgments and decrees of State courts. It is true, this Court held, in Murdock *vs.* Memphis, (20 Wall., 590,) that the omission of that provision did not enlarge the scope of its appellate power, but the act may, nevertheless, be regarded as a step in the direction of the eventual unfettering of that power.

The time seems ripe for Congress to ponder the language of Chief Justice Marshall, in Osborne *vs.* U. S. Bank, (9 Wh., 822, 823,) where he speaks of the "*insecure remedy* of an appeal upon an insulated point, *after it has received that shape which may be given to it by another tribunal*, into which he [the plaintiff in error] is forced against his will," and the language of Mr. Justice Story, in Gelston *vs.* Hoyt, (3 Wh., 246,) referring to the restrictive provision of section 25:

"Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do but to expound the law as we find it. The defects of the system must be remedied by another department of the Government," (p. 309).

The idea that this Court is foreign to the courts of the States, no longer meets with favor. The ubiquity of the several departments of the Government throughout the Union (Vaughan *vs.* Northup, 15 Pet., 1, 6; Mackey *vs.* Coxe, 18 How., 100, 105; Wyman *vs.* Halstead, 109 U. S., 654, 657–659) makes this Court as much at home in the several States as the State courts themselves. It exercises appellate jurisdiction over those courts, and is directly linked to them, by authority of the States themselves, through the Constitution of the United States—a relation of supremacy which is indispensable to the uniform construction and application of the Constitution and of the laws and treaties made in pursuance thereof.

Said Mr. Justice Bradley, speaking for the Court, in *Ex parte* Siebold, (100 U. S., 371, 394):

"Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. * * * The true interest of the people of this country requires that both the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution."

Equally applicable here are the remarks of Mr. Justice Strong, speaking for the Court, in Tennessee *vs.* Davis, (100 U. S., 257, 271, 272), with reference to the relation between the Circuit Courts of the United States and the States:

"They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that Government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts according to its own forms of proceeding."

It would be difficult to exaggerate the importance of the questions presented by this case. If the judgment of the State Court is to stand, it is manifest that the "Justice" which it was the purpose of the Constitution to establish, that is, to place on a permanent foundation in the land, has not been completely established in the particular of the prohibition against State laws impairing the obligation of contracts. But our reverence for the Constitution will not permit us to think that the "Justice," thus established, and nowhere else so established among men, is, after having been satisfactorily applied for a century and upwards, beginning to show weakness at a vital point.

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